

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PAMELA F. FRY

Claimant

VS.

SHARON LANE NURSING CENTER

Respondent

AND

KANSAS HEALTH CARE ASSOC.

Insurance Carrier

Docket No. 256,758

ORDER

Respondent and its insurance carrier appealed Administrative Law Judge Julie A.N. Sample's Award dated December 31, 2002. The Board heard oral argument on July 8, 2003. Stacy Parkinson was appointed as Board Member Pro Tem for the purpose of determining this matter.¹

APPEARANCES

Terri Z. Austenfeld of Overland Park, Kansas, appeared for the claimant. Kip A. Kubin of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) determined claimant made a good faith effort to obtain appropriate employment and awarded claimant a 61 percent work disability based on a 77 percent task loss and a 46 percent wage loss.

¹ Gary Peterson retired effective March 31, 2003, and at the time of oral argument a replacement had not been appointed to complete the unexpired portion of his term.

The issues raised on review by the respondent are: (1) nature and extent of claimant's disability; and, (2) whether the ALJ erred in awarding outstanding medical expenses. Respondent contends claimant didn't comply with the vocational rehabilitation plan and should be limited to her functional impairment. Respondent also argues the claimant received work disability payments during the time claimant continued working for the respondent through June 2000. Lastly, the respondent argues the prescription charges were not authorized by the treating physician and therefore should be denied.

Claimant notes respondent didn't schedule the vocational rehabilitation assessment until after the regular hearing and claimant was already employed. Claimant further argues she did cooperate with the vocational rehabilitation assessment and the failure to meet to finalize the plan was due to scheduling conflicts. Claimant requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board affirms the ALJ's Award.

The Board agrees with the ALJ's analysis of the evidence as set forth in the Award. The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

The principal issue in this claim is whether claimant made a good faith effort to find appropriate employment after she concluded that respondent was unable to accommodate her permanent work restrictions. When considering the entire record, the Board agrees with the Judge that claimant made a good faith effort to find appropriate employment.

Because of the pain she continued to experience the claimant quit working for respondent approximately June 1, 2000. After claimant reached maximum medical improvement from treatment and was provided permanent restrictions she contacted respondent several times to see if respondent would provide work within those restrictions. Claimant began looking for work when she was finally advised respondent would be unable to accommodate her restrictions.

It was not until late August 2002 that respondent offered vocational rehabilitation. The claimant first met with respondent's vocational rehabilitation vendor on September 5,

2002, the same day the regular hearing in this matter was held.² Claimant had already accepted employment at that time but still cooperated with the vocational assessment.

After meeting with claimant the vocational vendor drafted a plan to provide vocational placement assistance for four to six weeks. The claimant and the vendor never met to review and adopt the plan so the vendor closed the file. The crux of respondent's argument is that claimant did not meet to finalize the plan and accordingly such failure was indicative of bad faith. It is further suggested that if claimant had participated in the proposed placement then she would have found employment at a comparable wage.

Again, it is noteworthy that when the assessment meeting occurred, the claimant had already obtained employment. A review of the scheduled meetings and cancellations indicate that the vendor closed the file within approximately a week after he contacted the claimant's attorney to reschedule a meeting to discuss the proposed plan. On one of the suggested dates within that week the claimant had dental surgery. It is difficult to conclude claimant was failing to cooperate when she had such other matters to attend that had previously been scheduled. Lastly, it is disingenuous to argue claimant failed to attend meetings when the vendor agreed that a subsequent meeting was never scheduled. Under such circumstances it cannot be stated claimant failed to cooperate.

Turning to the issue of reimbursement for certain prescription drugs, the respondent argues there was no evidence what the drugs were for or that an authorized physician had prescribed the drugs. Claimant testified that the prescriptions provided by her doctors were the same drugs that the authorized treating physician had prescribed for her. The treating physician, Dr. Robert M. Beatty, indicated that even though he considered claimant at maximum medical improvement on November 27, 2000, he believed she needed and would benefit from the medications. The Board affirms the ALJ's determination claimant is entitled to reimbursement for those expenses.

Lastly, the respondent argues the award was incorrectly calculated because the work disability was computed from the date of the accident even though claimant continued to work for respondent for approximately six months after the accident. Claimant's permanent partial disability award would be limited to her percentage of functional impairment while she was working and earning at least 90 percent of her average weekly wage. But due to the accelerated pay out formula and because the compensation rate does not change, it makes no difference in the calculation of this award or in the amount due. Therefore, although the award simply uses the final percentage of work disability to compute the total number of weeks of permanent partial disability compensation, there is no remedy needed because there is no harm to rectify.

² Zumalt Depo. at 18.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Julie A.N. Sample dated December 31, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terri Z. Austenfeld, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Paula S. Greathouse, Workers Compensation Director